

## DEFERRED DEBATE IN SENATE

CONTESTED SEAT FROM KENTUCKY—CONTINUED

TUESDAY, DECEMBER 7, 1852.

The Senate having under consideration the following resolution, submitted by Mr. GWIN:

*"Resolved, That the credentials of Archibald Dixon, Esq., be referred to a select committee of five, who shall consider and report thereon."*

Together with the amendment proposed thereto by Mr. MANGUM, viz:

*"And that, pending the action of said committee, the said Archibald Dixon be now qualified and permitted to take his seat in the Senate."*

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Mr. MASON said: Mr. President, the question before us at this moment, I apprehend, is not to decide upon the right of the gentleman who has brought his credential here. Shall we decide them for him without a reference to a committee? I apprehend no Senator proposes that. The question is upon the reference of the credentials.

The honorable Senator who has just addressed us has attempted to prove that if that gentleman is not allowed to take his seat at once, under these testimonials, it will violate the whole usage of the Senate. Sir, that Senator is mistaken. He will find it impossible to search out a precedent where one bringing credentials from a Legislature has taken his seat under them, unless in case of an admitted vacancy; and the reason is obvious to common sense, that, whether he be entitled or not, he brings prima facie evidence that he is entitled, and it is right and just that the representation of the States should be full until his right is inquired into if it is questioned. But that

I insist upon it that the Governor of Kentucky had no right to put any limitations in his commission to the Mr. Meriwether. I insisted upon it before, and it is the ground that I now occupy. I do not wish to prejudice this question. I do not believe there is a vacancy in the Senate from the State of Kentucky, as I said before. As to Mr. Meriwether, I am very glad that he is the Senator from Kentucky prepared to take the seat, but he is the Senator from Kentucky, he has resigned his seat—that he will not come here and take his seat. If the Senator say—is he prepared to say—that if Mr. Dixon's election is declared to be an invalid one, Mr. Meriwether will not come here and claim the seat that has been conferred upon him by the Executive appointment of the Governor? I am not prepared to say that he will not come here. Whether Mr. Meriwether is contesting the seat or not, if he is declared to be a Senator from Kentucky, you will very soon see him in his seat. There is no mis-

As the Senator from Virginia says, I do not wish to occupy the time of the Senate in discussing this question now. I want to vote. I am prepared to vote, and I hope the Senate is prepared to vote, whether or not it will let the gentleman who now applies be sworn in, or whether it will send the case to a committee for investigation.

Mr. SEWARD. Before the question is taken I have a word more to say upon it. The question is then I have a Virginian (Mr. Mayhew seems to me to concede the who claims the APPOINTMENT which he presents. He concedes to the honorable Senator from Tennessee, who has so very ably and fully argued the question this morning, that where there is an *admitted* vacancy, a person who presents credentials from the Legislature authorizing him to take the seat, thus admitted to be vacant, should be received and sworn in as a member of the Senate, subject, however, to the reservation that his right to retain it against some other claimant shall always be open to the examination

of the Senate. But he says that this principle is confined to the case where there is an admitted vacancy. Now, sir, I ask what constitutes an admitted vacancy? What constitutes the admission of a vacancy? An admission implies a party qualified to admit, with a title to admit or to deny, and an act of admission, as opposed to an act or declaration of denial. I ask for the party who *denies* in this case. Let him stand forth in the presence of the Senate of the United States and of the American people. I ask, I challenge him to come upon the floor of the Senate and to say, "I am the party who denies." Who is he? Let him stand forth and he shall be heard. He comes not. There is no man here that is qualified to deny. Then, when no man appears who is qualified to deny, the world admits or regards the case as admitted.

But we are told that there is somebody somewhere who is qualified to deny, and that we must prove a negative, and prove that no such person does deny, or can deny. Well, sir, the honorable gentleman who presents his credentials here takes that burden of proof voluntarily upon himself. He takes it upon himself, and does show that any person who it is alleged might make this denial fails to come and make it, and therefore admits that he is not that person. I have the honor,

that the seat is vacant. Yes, sir, he shows that; and how does he show it? There, in the place in which the honorable Senator from Ohio (Mr. CHASE) is sitting temporarily, [pointing to the seat occupied by Mr. Meriwether at the close of the last session,] is the seat which was filled by the Senator who represented the State of Kentucky in this Senate on the first day of September last. That seat is vacant. There is the evidence that the place is vacant. It is prima facie evidence. It is sufficient.

tion prerogative that the Executive "may make temporary appointments until the next meeting of the Legislature, which shall *then* fill such vacancies." So that neither the Executive nor the Legislature are authorized by the Constitution, it would seem, to fill a vacancy happening during a recess of the Legislature until *after* the vacancy shall happen; and therefore, if this were a vacancy arising during the recess, and one Legislature might fill it, it must be at a meeting subsequent to the happening of the vacancy, and on the face of these provisions it is clear that the Legislature of Kentucky undertook to fill the vacancy in advance, so that the question is presented upon the face of the credentials; and we are to inquire whether the Legislature of Kentucky has followed the authority conferred by the Constitution. I have felt called upon to say this much in reply to suggestions thrown out by the Senator from Tennessee and the honorable Senator from New York, who have gone at length to the discussion of the general question, but would not suppose their views were assented to as correct and unanswerable.

But when did the vacancy in question first occur? Did it in fact happen on the first Monday of September? The death of Henry Clay, deposed by the whole nation, occurred on the 29th of June last, and that death created a vacancy which may be regarded as covering the whole unexpired term of Mr. Clay. Can that vacancy which first occurred be divided and cut up into parts, except so far as the Constitution prescribes? The Executive can fill that part of it which occurs before the first meeting of the Legislature; but can he divide such portion into parts? No, is there any thing to prevent his appointing a new Senator for each day of the period he is authorized to fill? He has any other authority than to fill the vacancy, without imposing other limitations than those prescribed by the above mentioned clause?

It would seem, then, that the latter would be acts :—  
first, whether this was one of those vacancies pre-  
sented which must be filled by the Executive ; and, secondly, if it  
was not a vacancy to be filled by the Executive, whether  
it was not one that must be filled by the Legislature *sub-*  
*sequent* to the time when it happened? And it makes no  
difference in my mind whether there is or is not any one  
present to claim the seat. The question is whether the  
Legislature of Kentucky, at the time it undertook to  
make this election, possessed that power. It has already  
been decided in one case—the case of Mr. Lannan, who  
claimed a seat as Governor from Connecticut under Execu-  
tive appointment—that the Legislature has no authority  
to make an appointment to fill a vacancy prior to the  
time such vacancy has actually arisen. It remains to be

determined where the Legislature possess such power. Story, in his Commentaries upon the Constitution, vol. 2, page 204, adverts to this subject, and says:

"There seem to have been three courses presented for the consideration of the Convention—either to leave the vacancies unfilled until the meeting of the State Legislature, or to allow the State Legislatures to provide at their pleasure, prospectively, for their occurrence, or to confide a temporary appointment to some select State functionary or body."

It would seem, therefore, that the great question is whether the Constitution conferred upon the Legislature authority to fill this vacancy in advance? It is unlike the case of electing a Senator to fill a term which is to commence at a future day, for in such case the Constitution does not prescribe the time when the election shall be had, while it does so in explicit terms when a vacancy happens during a recess of the Legislature.

MR. BUTLER (Mr. President, this subject ought to make one course or the other. We ought either to discuss it in the Senate, or in the whole, and decide upon it in the Senate, or we ought to do nothing. I confess that I have no definite opinion upon the subject, but I think the question resolves itself into this: What is a vacancy within the contemplation of the Constitution? Mr. Clay agreed to hold his seat for about nine months after the date of his letter until his resignation became perfect by the expiration of that time. There might have been a vacancy at that time, but it was not one occasioned by his death; and then the question arises, whether there was a vacancy after that time with regard to the residue of the six years for which Mr. Clay was originally elected. And then a question occurs upon that, whether it was competent for the Legislature, before the

political opinions. He believed that they had the right to resign in anticipation. They both resigned. The Legislature in Kentucky filled the vacancy. No Legislature resigned in session in Georgia, the Governor of that State held the vacancy. The power of the Governor of the State of Georgia and the power of the Legislature of the State of Kentucky depend upon the Constitution of the United States. Both of them both is to be found in the same clause. When did my late distinguished colleague resign? He resigned in the month of April last, but his resignation was to take effect on the first of June. The Senator from Maine (Mr. BRADBURY) says a Governor cannot appoint until a vacancy has actually occurred, and that the Legislature cannot fill the vacancy until the vacancy has actually occurred. Is that true? Where is the article of the Constitution preventing it? There is no opinion of a single distinguished jurist or constitutional lawyer from the foundation of the Government to the present denying the power to the Governor or Legislature to fill a vacancy. The Governor of Maine was appointed on the 17th day of May, his appointment took effect from the first of June. Why was he appointed in that way? In order that he, as the successor of Judge Berrien, might be here on the first day of June, so as Judge Berrien vacated the seat in order that he might be here on the first day of June. It is well known that each State should uniformly—each should have two Senators in this body—might be fully represented. That is the reason of it.

Why, let me suggest a case to the Senator from California. Suppose he desired to resign to-morrow, but did not wish to deprive his State of two Senators upon the spot; if the Governor of California could not appoint till after the day of the resignation, it would be probably two months before there would be a successor here to take the seat. Did the Constitution of the United States

principle, ever contemplate that man must resign on a particular day, and that the very day he resigns, he must leave the seat, and thereby leave a place vacant in the Senate of the United States? Under such a state of the law, the more distant a State was from the Government, the longer a vacancy would exist. From the denudation of the Government the practice has been deduced. In 1815, in the case of Blaise, the Senate decided, by a solemn vote of 27 to 6, that a Senator had a right to resign in anticipation. And what was the principle of that case? We look back at the debates, and you will find that the law was thus: the resignation ought to take effect on the day that the resignation was made the elective or the appointing power should have the opportunity of appointing a person to fill the vacant

My friend from South Carolina says that he has now doubt that a Senator may resign, to take effect in *future*. If he may resign, to take effect in *future*, it is for the purpose of enabling the appointing power to fill the vacancy in anticipation of the day upon which the resignation is to take absolute effect; and, in his language,

Resignation is a deed executed, and the person who has executed it is dead, either in the seat or the designation who is to take the position. He cannot fill it in anticipation; and when he comes here with a deed made in anticipation, and presents it on the proper day, it takes instantaneous effect, and the party entitled is entitled to be admitted to the seat. And it is right that it should be so. Now, if it be true that Mr. May had a right to resign in anticipation, the electors have a right to fill the vacancy in anticipation. The Legislature has the right to fill the vacancy in the present applicant, the Hon. Mr. Dixon, to take the seat under the precise power under which the Governor of Georgia appointed my present colleague.

wish it to be understood that I do not say all this is  
 right. The decision of 1815 may have been wrong, and  
 the subsequent practice may have been wrong; all I say  
 is that if this course has been admitted by Congress—if  
 it has been acquiesced in by the States, and become the  
 practice of the Government here, and the practice of the  
 Governments of the States, when this gentleman presents  
 himself here, it is but courteous to the State—it is but  
 using the uniform course, to permit him to take his  
 seat upon the *prima facie* case. And why? Because the  
 State is entitled to two Senators, and he makes out a

made. I shall vote for that amendment; but if that is not prevail, I shall be willing to bow to the will of the majority, and to an immediate reference.

I think, Mr. President, that your long experience in this body you have never known such an application as the present one to be denied. I do not think there has been any case since you have occupied that chair, or have been a member on this floor, where a member presenting the broad seal of his State was not permitted to occupy the seat; and if there was a contest, it was settled afterwards. It has always been customary to endeavor to keep the representation of the State.

I have hoped this application will be agreed to for the sake of consistency and for the purpose of having uniformity. Our institutions depend very much upon uniformity in the construction of the Constitution, and I am like to see uniformity of action in the body to which I belong—the Senate of the United States. There will be harm done to any human being by this course.

It is said that there are doubts as to whether Mr. Dixon entitled to the seat. If there be doubts, as the Senator from Tennessee has said, to whom should you give the seat of them? Of course to the party claiming the seat under the broad seal of one of the sovereign States of this Union, equally interested with us in preserving the Constitution. Hence it is that I say he should be permitted to take his seat, and then, when the report comes in the language of the Senator from South Carolina, I can consider it maturely. By the course that I have proposed we shall stick to precedent and cannot be

Mr. BADGER. Mr. President, from what has fallen from the gentlemen who have addressed the Senate upon this subject, it appears to me undeniable that there are many difficulties connected with the inquiry suggested by the resolution.

resolution of the senator from California. I am not now prepared to express any definite opinion as to the merits of the course of action which he has taken in regard to the subject under their consideration. I have not been so far, to see the necessity for any reference of this question to a committee. The facts of the case are all before the Senate; no evidence is to be heard by a committee; no inquiry is to be made by which the state of the question before the Senate can be varied or affected; but, sir, it may, for aught I am able at present to perceive, be necessary, or, if not necessary, proper that there should be a previous investigation by a committee. It is highly important, at all events, that this question should be fully considered, and be fairly and impartially decided. I have no objection at the present moment to vote upon the question under the proposition which has been made.

WEDNESDAY, DECEMBER 8, 1852.

as the question is not decided who is entitled to seat, and inasmuch as the list which contains the names of all the Senators of the last session shows a majority of David Meriwether, he cannot, without the assent of the Senate, direct that seating be reversed, therefore, that the Senate will take into consideration, as the yeas and nays have been ordered, by the name of Mr. Meriwether shall temporarily be used with, or whether his name shall be called. I repeat again that he does not feel at liberty, if the question is decided as to who is entitled, to have his name stricken from the list.

DAVID LAWSON took the seat he credentials, which Mr. Meriwether took his seat he read, in a

we may see whether or not, according to the  
 you on our table, his name is entitled to be upon  
 r. BRODHEAD. I do not see any good end re-  
 sulted by the reading of the credentials called for  
 Senator from Georgia. It raises the very ques-  
 tion we had up yesterday. The credentials were  
 the Senate, and were then considered. If we al-  
 low to-day with the question which was then under  
 consideration and proceed with the debate, let us do it in  
 the same way, upon the resolution of the Senator from

Mr. HUNTER. Mr. President, I do not see any objection to the difficulty—because it makes it possible the whole question—unless by general consent that Mr. Meriwether's name shall not be used until the whole matter is settled by the Senate, either by reference to a committee or in some other way. I think that by general consent we agree to that course, and reserve the question.

Mr. CLEMENS. It seems to me that this matter is the whole question. It is certainly due to Mr. Meriwether, and it is certainly due to the public, which will determine what is to be done.

Mr. CLEMENS. If he is a member of the Senate, his name must be called. If he is not, it cannot be. If his name is not called, I insist that his name shall be called. If he is not a member of the Senate, no one has the right to call his name.

Mr. BRODHEAD. He is interested in the question.

Mr. CLEMENS. But still his name must be called if he is a Senator.

acted upon the roll, except according to the credentials before them, unless there be a contested election; and the Senate must settle the right between the parties, not wish to change the issue. The only object I had in view was to give the reasons why I thought Mr. Merri-er's name ought not to be called. I called for the reading of his credentials in order that every one might know that his term of service expired on the first Monday of September last, and that therefore his name is not now eligible to be upon the roll.

test for only three years, it would not produce the best effect upon the tenure of office of the person elected. When the Governor appointed Mr. Meriwether he fulfilled his constitutional duty; but the tenure of his office does not depend upon the opinion of the Governor. It does not preclude that question at all. The tenure of his appointment, when it is once made, depends on the opinion, and of that we are necessarily the judges. Therefore, consider the certificate of the Governor as conclusive evidence of the appointment of Mr. Meriwether for the time being. But for a long Mr. Meriwether shall retain his seat in this body is a question entirely beyond the jurisdiction of the Governor.

not prejudicing the claim of the individual who pre-ferentially showing the action of the Legislature, the claim of Mr. Meriwether, who before occupied the position of Senator from Virginia is not, in my opinion, a proper subject for the Senate. His resignation, be omitted from the roll until there shall be a session by the Senate of the constitutional question.

CASS. I understood that that was objected to by senator from Alabama.

HUNTER. I had no desire to say any thing in regard to the merits of the question. The time has not yet come that I spoke only as to the proper mode of conducting it. Now, contested elections may present two classes of cases. One, to wit: who has the return; and another, to wit: who is elected; and precedents may be found in the case of the given one. I think the Senate is taking *prima facie* notice upon the question of precedents.